

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATRINA L. COLBERT and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, TINKER AIR FORCE, OK

*Docket No. 99-1948; Submitted on the Record;
Issued August 29, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has a permanent impairment of the left foot due to her February 16, 1996 employment injury.

On February 16, 1996 appellant, then a 36-year-old supply clerk, caught her left foot between a pallet and pallet jack and then fell, twisting her left foot. The Office of Workers' Compensation Programs accepted her claim for fractures of the second and third metatarsals of the left foot and paid temporary total disability compensation for the periods she did not work. Appellant underwent surgery on February 28, 1996 for open reduction of the fractures.

On March 3, 1997 appellant filed a claim for a schedule award. In a June 30, 1998 decision, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence of record showed she did not have any permanent impairment of the left foot which would entitle her to a schedule award. In a July 3, 1998 letter, appellant requested reconsideration and submitted additional medical evidence. In a May 17, 1999 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that appellant does not have a permanent impairment of the left foot and therefore is not entitled to a schedule award.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

In a November 20, 1996 report, Dr. Raymond L. Smith, a podiatrist, stated that appellant had a slight amount of tenderness around the surgical site. Dr. Smith noted that her left ankle had dorsiflexion of 0 degrees and planter flexion of 35 degrees, with inversion measured at 20 to 25 degrees and eversion at 15 degrees. He stated that appellant had a 23 percent permanent impairment of the foot. In a July 6, 1997 memorandum, the Office medical adviser stated that the figure was not probative because Dr. Smith did not refer to the A.M.A., *Guides* and did not explain how he reached the calculation of a 23 percent permanent impairment of the left foot. The medical adviser noted that the dorsiflexion of zero degrees would be a permanent impairment of seven percent of the left foot. He recommended that appellant be referred to an appropriate specialist.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Houshang Seradge, a Board-certified orthopedic surgeon, for an examination and opinion of whether appellant had a permanent impairment of the left foot. In an August 1, 1997 report, Dr. Seradge reported that appellant had no loss of motion in the ankle, foot or digits of the foot. He noted appellant did not have decreased strength, atrophy or ankylosis. Dr. Seradge noted appellant complained of decreased sensation to the back of her foot, which corresponded to the surgical incision. He related that, on a scale of 0 to 10, appellant described her pain as 3 to 4 when off her feet, rising to 6 when she had severe pain. In a June 15, 1998 report, Dr. Seradge stated that appellant had minimal complaints of occasional swelling and discomfort in the left foot. He stated that appellant retained active motion in the left foot and ankle was within normal limits. Dr. Seradge found no sensory changes or ankylosis in the foot. He noted that appellant had subjective complaints of pain and discomfort. Dr. Seradge concluded that appellant had no permanent impairment of the left foot.

In his request for reconsideration, appellant submitted a July 13, 1998 report from Dr. David C. Cavallaro, a podiatrist, who stated that appellant had a five percent permanent impairment of the left leg due to impairment of the superficial perineal nerve. Dr. Cavallaro reported that appellant had 15 degrees of interphalangeal flexion which equaled a 5 percent permanent impairment of the leg and a 7 percent permanent impairment of the left foot. He indicated that appellant had inversion of eight degrees and eversion of five degrees which equaled a five percent permanent impairment. Dr. Cavallaro noted that appellant had mild restriction of plantar flexion which equaled seven percent of the left leg. He concluded that appellant had a 22 percent permanent impairment of the left leg and a 14 percent permanent impairment of the left foot.

To resolve the conflict in the medical evidence between Drs. Seradge and Cavallaro, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Phillip L. McCown, a Board-certified orthopedic surgeon, for an examination and his opinion on whether appellant had a permanent impairment due to the employment injury. In a

³ (4th ed., 1993).

⁴ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

May 5, 1999 report, Dr. McCown indicated that examination of the left foot revealed no crepitation of mid foot joint. He noted that appellant complained of mild tenderness to even light palpation over the area, which were out of proportion to any findings. Dr. McCown reported that appellant had ranges of motion in the left foot of 25 degrees, extension; 48 degrees, flexion; 45 degrees, inversion; 32 degrees, eversion; 50 degrees, heel inversion and 18 degrees of heel eversion. He commented that, although appellant subjectively reported pain in the left foot, she was able to walk a mile and a half, three times a week. Dr. McCown stated that appellant had not developed arthritis of the foot. He concluded that appellant had no permanent impairment of the left foot. In situations when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵ In this situation, Dr. McCown had an accurate history of appellant's injury and condition and concluded, based on his examination, that appellant had no permanent impairment of the left foot, not even for pain, because her complaints were out of proportion to the objective findings. His report therefore is entitled to special weight and, in the circumstances of this case, constitutes the weight of the medical evidence. Dr. McCown's report provided a sufficient basis for the Office's conclusion that appellant had no permanent impairment of the left foot.

The decisions of the Office of Workers' Compensation Programs dated May 17, 1999 and June 30, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

⁵ *James P. Roberts*, 31 ECAB 1010 (1980).